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IN THE

Supreme Court of the United States

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California, *et al.*,
Petitioners,

v.

NORMAN WILLIAMS COMPANY, *et al.*,
Respondents.

On Petitions For Writ of Certiorari To The Court of Appeal of the State of California, Third Appellate District

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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MOTION BY WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC. TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

The Wine and Spirits Wholesalers of America, Inc. ("WSWA") and National Beer Wholesalers Association of America, Inc. ("NBWA"), pursuant to Rule 36 of this Court, move for leave to file the annexed brief *amici curiae* in support of the petitions for a writ of certiorari. Written consent of counsel for the petitioners has been obtained.

Counsel for respondents have refused their consent to any *amicus* briefs "prior to acceptance of [this] case by the Supreme Court." Copies of those consents and refusals are herewith filed with the Clerk of the Court.

WSWA and NBWA, both not-for-profit corporations, are the major national trade associations for wholesale distributors of distilled spirits, wines and malt beverages. These wholesalers conduct their businesses in the "open" or "license" states, which permit the private enterprise distribution of alcoholic beverages (as distinguished from the minority of "monopoly" or "closed" states in which the state itself operates the business of wholesaling one or more types of alcoholic beverage). WSWA has more than 800 members in 41 states, and NBWA has more than 1800 members in 50 states.

Distribution of alcoholic beverages in the open states is conducted pursuant to wholesale licenses. In keeping with the traditionally accepted need for governmental regulation of beverage alcohol, all levels of the trade in these products are subject to highly detailed but purposefully integrated regulatory complexes which, reflecting the individual policies of the particular state, differ significantly from state to state and beverage to beverage.

The decision below (*Norman Williams Co.* v. *Rice,* 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980)), which has attracted widespread attention in view of its radical departure from controlling precedent and threat to effective competition and existing governmental regulation in many states other than just California, is of the utmost importance and concern to the members of WSWA and NBWA.

If not repudiated, the erroneous legal principles adopted by the court below in striking down California's wholesaler designation or primary source statute threaten the similar statutes of the many other states where the members of WSWA and NBWA do business. The *Williams* decision also invites challenge of myriad other regulatory provisions on the same mistaken analysis of federal anti-

trust law and objectives and, at the very least, creates debilitating uncertainty as to whether state agencies should enforce or licensees should comply with those governmental regulations.

If accepted as a viable precedent, *Williams* presages the destruction by the courts, without the benefit of the rule-of-reason analysis mandated by this Court in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), of the franchised distributor system prevailing in the alcoholic beverage industries. As in other industries, this pattern of distribution exists because it achieves the most effective interbrand competition by holding designated wholesalers responsible for providing the local market services necessary to promote the maximum sales of each brand entrusted to them. Elimination of franchised distributorships would result in a substantial reduction of the number of brands available to consumers, the number of retailers serving them, and the number of wholesalers competing for their trade.

In wholly misconstruing this Court's recent opinion in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 455 U.S. 97 (1980), the decision below constitutes a spurious, but nonetheless dangerous, precedent as to the supposed repugnancy of state alcoholic beverage regulations to the federal antitrust laws. It also disregards the long-standing construction of the extent of the power granted to the states by the Twenty-first Amendment to control the importation and structuring of the distribution of those products within their borders.

The fundamental changes in the structure, competitive tenor and governmental regulation of the alcoholic beverage industries in this country threatened by *Williams* make this case one of broad impact and extraordinary import not only to the WSWA and NBWA members and other participants in those industries but to the states and their regulatory agencies, as well. WSWA and NBWA, therefore, respectfully request leave to file the annexed

brief to present matters germane to this Court's exercise of its discretion but not treated or not developed fully in the petitions because of the differing, although wholly compatable, positions of the respective petitioners.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

As *amici curiae,* Wine and Spirits Wholesalers of America, Inc. ("WSWA") and National Beer Wholesalers Association of America, Inc. ("NBWA") respectfully urge that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Third Appellate District, which, solely upon grounds of asserted federal repugnancy and upon the face of the statute, enjoined enforcement of the "designated wholesaler" or "primary source" requirement for the importation of distilled spirits enacted by the legislature of that state as §23672 of the California Business and Professions Code. *Norman Williams Co.* v. *Rice,* 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980)[1]

1. The opinion of the state court appears as Appendix A to the Petition for Certiorari filed with this Court by Wine & Spirits Wholesalers of California, an intervenor below. Citations to that opinion in this brief will be by reference to the page number of that Appendix A (*e.g.*, "A5").

Statement

Since 1973, §23672 or its predecessor has prohibited any California wholesaler from importing into California any brand of spirits unless designated as an authorized importer by the brand owner. These provisions were enacted by the legislature to facilitate administration of the state's overall regulatory scheme by stopping the purchase of liquor from Oklahoma wholesalers by parties licensed in California but not designated by the supplier or primary source of the brand. This "Oklahoma connection" springs from the peculiar provisions of the Oklahoma liquor laws. They provide that any brand sold to an Oklahoma distributor must be sold, without limitations on quantity, to all other Oklahoma wholesalers choosing to buy it. The Oklahoma laws also provide that Oklahoma wholesalers may sell to "qualified persons" outside Oklahoma. (37 Okla. Stats. §§521(e), 533)

The California licensees who challenged §23672 purchased from Oklahoma wholesalers only certain leading, fast-moving, nationally advertised brands in just the most popular container sizes. Enjoying a cost advantage from dealing with accounts taking large-volume deliveries and avoiding the higher expense incurred by the designated wholesalers responsible for serving all types of retailers, no matter how distant, small or costly to serve, the non-designated wholesalers profited from the "Oklahoma connection" by "cream-skimming" the lucrative segment of the retail trade. Deprived of that business by prices they could not match, the designated wholesalers' average unit costs were increased both by the reduction in their former volume of business and the higher costs of serving the remaining marginal or less profitable accounts.

A majority of the license states have primary source statutes which, like §23672 in California, require that one or more types of alcoholic beverages, whether distilled

spirits, wine, or others, come directly from the brand-owning supplier (*e.g.*, distiller, rectifier, vintner, brewer, prime importer or other "supplier"). These suppliers are required to hold licenses or permits and are subject to state regulation and control as a condition to the states' allowing the importation of or sale within their borders of the suppliers' brands.

The primary source statutes advance the legitimate legislative purposes not only of facilitating state control of alcoholic beverages at all three tiers[2] of the trade but also of orderly, efficient and competitive marketing to provide ready availability of many competing brands at all types of retail outlets, small and large, in sufficiently numerous locations to insure convenient access to consumers and to encourage both price competition and the furnishing of a broad variety of pro-competitive, volume-building wholesaler services. The statutes achieve these objectives by permitting selective franchising by suppliers of only certain wholesalers (whether one or several in a given marketing area), who are then obligated to invest their time, effort and money in serving all retail accounts and furnishing the services necessary to promote sales of a particular supplier's brand in vigorous competition with those of other suppliers, enhancing brand recognition and consumer demand for and satisfaction with that brand.

Using distilled spirits as an example, that industry, because of the importance of brand recognition in the minds of consumers, deems it essential that brands be available in every outlet where they can be placed, that desirable shelf or display space be obtained at retail estab-

2. The regulatory structures controlling the importation of alcoholic beverages into the states mandate a "three tier" system comprised of separate entities at each of the supplier or producer, wholesaler and retailer levels. Suppliers can sell only to licensed wholesalers and not to retailers. The suppliers, therefore, must look to the wholesalers for the myriad services essential to maximizing the sales volume of their brands in competition with the many brands of competing suppliers.

lishments everywhere possible, that the wholesalers educate the retailers as to the merits of the brands they carry and persuade them to recommend them to consumers, that full stocks in all sizes be continually and readily available for prompt delivery to retailers wherever located and however small, and that wholesalers provide a variety of other services, all of which are designed to build the brand and increase consumer call for it. The provision of these services is necessary to realize the enhanced sales volume which results from the wholesalers' engaging in total account coverage. Thus, in addition to wholesaler promotional services, placing a brand in every possible outlet is necessary to attain the broad availability and visibility which both satisfy and augument demand by creating a consumer image of the popularity and quality of the product. Even the few brands most heavily advertised by the suppliers cannot achieve their potential without such wholesaler promotional support, which is necessary at the local market level to win retailer and consumer acceptance of the brand and thrust for its advancement.

In consequence of the ability which the primary source requirements afford a supplier to designate selectively and hold franchised wholesalers responsible for securing the broadest possible account coverage in order to achieve maximum volume and enhance consumer awareness and demand for the brand, such a wholesaler must be willing and able to serve the large number of small, distant and marginal accounts, including the lower-volume on-premise consumption outlets such as restaurants, clubs and bars, which are costly to serve[3]; he cannot "cherry-pick" and

3. Many retail accounts are at best marginally profitable because of the higher costs of serving them. In addition, the average unit costs of distributing a brand can be lowered when duplication of services, inventory and other expenses is avoided or minimized by the economies of scale which result from placing a brand with one or several but not all wholesalers. These economic factors support the selective distributional patterns which primary source statutes permit as the lowest cost, most efficient means not only to introduce new brands but to keep existing brands in fully effective, vigorous competition with those of other suppliers.

concentrate solely on the large retail stores, which offer greater profit potential but which, alone, are unable to provide the total volume and brand-building consumer awareness which flow from marketwide availability and visibility when the brand is placed and featured in every possible outlet.

As this Court has recognized (see, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)), selective designation of wholesalers and the imposition of vertical restrictions upon where and to whom they can resell (restrictions not required by the primary source laws in California and most other states), can maximize sales for a supplier by achieving efficiencies and stimulating the furnishing of competitive services by wholesalers committed to building volume for his particular brand. Such distributional restrictions limit or prevent other "free riding" wholesalers—those who elect not to undertake and bear the cost of promotional, volume-building efforts but choose instead to concentrate upon the large-volume, most profitable accounts—from reaping the benefits of such interbrand competitive activities and destroying the capacity of others to provide such services. "Free riding", by reducing the volume designated wholesalers sell and their gross profits, prevents them from providing such competitive services because the costs incurred cannot be recovered.

To the extent that the primary source statutes protect them from the "free rider" problem, the franchised wholesalers in the alcoholic beverage industries have been stimulated and enabled to undertake the commitment and cost of furnishing their panoply of volume-building services not only for leading brands but also for newly introduced, less successful or even struggling brands. If the *Williams* decision stands, however, these salutary interbrand competitive activities are doomed in California and seriously threatened in the other primary source states where the mistaken precepts of that decision may be adopted. The "Oklahoma connection" and the peculiarities of that state's prohibition upon selective wholesaler franchising

will be substituted by erroneous judicial determination for the primary source laws enacted by the state legislatures.

Such interference with the determinations of the state legislatures as to the alcoholic beverage control structure they deem best for their purposes is not merely a disquieting throwback to that era when courts sat as "superlegislatures to review the wisdom" of statutory enactments. Equally disturbing in terms of the importance of the issues raised by the judicial invalidation of the California statute is the adverse effect upon competition there and in any other state where the courts may adopt the same mistaken rationale. Even a cursory look at the competitive structure of the liquor business in Oklahoma evidences the stultifying effects upon interbrand competition which can be anticipated with the effective elimination of wholesaler designation which the *Williams* decision augurs and the resulting cessation of those volume-building services a franchised wholesaler is responsible to the supplier of a brand for furnishing. Compared to the more than one hundred wholesalers in California, under Oklahoma's no-franchise requirement the number of wholesalers has declined from more than twenty to not more than six, two of whom account for 60 percent of all sales in the state. Posted wholesaler markups have become identical. Hundreds of brands sold in California are unavailable to consumers in Oklahoma. New brands introduced in California and elsewhere are not distributed in Oklahoma. A few leading, nationally advertised brands command a disproportionately high share of the Oklahoma markets in comparison with their showing in California and other franchise states.

Wholesaler promotional services to build the volume of any brand in competition with those of other suppliers are non-existent in Oklahoma. In essence, competition and consumer demand are determined solely at the distiller level and substantially in terms of only the small number of brands which are nationally advertised. Even those brands fail to reach their maximum potential because

of the lack of local wholesaler support. At the consumer level, the trade in the metropolitan areas is dominated by a few large retailers (one of whom accounts for approximately 10 percent of total sales in the state) whose volume permits them to sell at prices which hold down the number of retailers because smaller stores cannot compete.

A markedly similar picture has emerged in Minnesota in the last few years since that state adopted a requirement that suppliers sell to all wholesalers, thereby prohibiting designated wholesaler franchises.[4] By contrast, to encourage more effective competition, Kansas has recently substituted an exclusive distributorship requirement for its former requirement that suppliers sell to all wholesalers, and there has been a substantial increase in the number of brands available and competing with the leading brands there.

Reasons for Granting the Writ

In its *Williams* decision, the California court has decided federal questions of substance in conflict with the applicable decisions of this Court and in direct conflict with a recent decision of the Supreme Court of Kansas, from which an appeal taken to this Court was dismissed this Term for want of a substantial federal question. The erroneous invalidation below of the California designated wholesaler or primary source statute has already prompted suits challenging such statutes enacted in other states and, unless overturned, is likely to precipitate litigation in many other courts, state and federal, attacking not merely primary source requirements but also other provisions of the alcoholic beverage control laws of numerous other states. The impact of *Williams* in California and elsewhere, if that decision is adopted by other courts, will be (1) the undermining of state regulations controlling the importation and structuring of the distribution of such

4. While it requires sales to all wholesalers of any brand sold there, Minnesota, unlike Oklahoma, prohibits Minnesota wholesalers from selling elsewhere unless authorized by the brand owner or supplier. (Minn. Stats. Ann., §§340.114 and 340.145)

beverages within their borders, contrary to the delegation of such powers to the states by the Twenty-first Amendment, and the forcing upon them of Oklahoma's prohibition of wholesaler franchises, (2) the upsetting of requirements designed to simplify and make more certain the auditing and collection of the very substantial tax revenues realized by the states from such beverages, and (3) a diminution in the vigorous interbrand competition now prevailing in the alcoholic beverage industries which will result from the destruction of effective supplier designation of wholesalers on a selective basis. Absent such designation, wholesalers can no longer be willing and able to undertake the obligation to furnish those services designed to maximize sales of the brands franchised to them in competition with the numerous brands of other suppliers.

A. In Striking Down California's Designated Wholesaler/Primary Source Law On Asserted Federal Antitrust Grounds, The *Williams* Case Conflicts With Controlling Decisions Of This Court And Of The Kansas Supreme Court.

The court below erroneously found that the designated wholesaler/primary source requirement of §23672, on its face and without reliance upon any showing of adverse competitive effect,[5] violates the Sherman Act. The state court held (A8-A9):

> "The designation statute gives brand owners the unfettered power to restrain competition . . . by merely deciding who may and may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine. . . .
>
> ". . . The statute goes much further than to merely allow a manufacturer to determine to whom it will sell;

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it allows the manufacturer to forbid others to sell to a disfavored importer. . . ."

That the California court was misconstruing or disregarding this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), is highlighted by its treatment of that controlling precedent (A10):

> "We find the decision in [*Sylvania*] to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to refuse to trade with them; rather, they attack the state provided authority of the distillers to prohibit them from trading with others. Nothing in [*Sylvania*] authorizes a state to delegate such power to a private party."

The Court's rationale in *Sylvania* clearly was not limited to unilateral refusals to deal with purchasers who disregard a supplier's restrictions upon where or to whom they can resell. By overruling the *per se* holding of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court unequivocally re-established the proposition that vertical non-price restrictions, including even territorial confinement of an exclusive distributor, require a rule-of-reason evaluation even when effected solely by the private action or agreement of those parties, because such restrictions fail to meet the "demanding standards" for invoking the *per se* rules (*i.e.*, a "pernicious effect on competition and lack of any redeeming virtue"). (433 U.S. at 50)

More specifically, as noted earlier, in *Sylvania* this Court recognized that vertical restrictions going beyond a refusal to deal other than just with those franchised by or acceptable to the supplier, notwithstanding their reduction or even elimination of intrabrand competition at the level of the distributors, by stimulating the designated distributors to provide pro-competitive promotional serv-

ices can enhance competition overall, heightening the thrust of the supplier's products in interbrand competition with those of competing suppliers.[6] (433 U.S. at 50-59)

In short, the state court's conclusion that *Sylvania* is inapposite to its determination that California's designation statute violates the Sherman Act because it delegates to private parties "the unfettered power to restrain competition" by allowing "manufacturers to forbid others to sell to a disfavored importer" squarely conflicts with what this Court in fact decided in *Sylvania*.[7] Without any *per se* violation of the antitrust laws, suppliers in the alcoholic beverage industries could condition their sales to Oklahoma wholesalers, vertically restricting and forbidding them to resell outside that state. *Sylvania* would require proof by the rule-of-reason standard that an unreasonable restraint of trade resulted from any such restriction before an antitrust violation could be found.[8] Only the peculiarities of the Oklahoma liquor laws, not any principle of federal antitrust law, prohibit suppliers from imposing

6. Interbrand competition, the Court declared, is the "primary concern of the antitrust laws" and the ultimate protection of consumers, because without it no amount of intrabrand competition can insure the availability of substitute competing products and the "significant check on the exploitation of intrabrand market power" thus provided by the existence of interbrand competition. (433 U.S. at 52 n.19).

7. In holding that the designated wholesaler requirement of the California statute, on its face, constitutes a *per se* violation of the Sherman Act, the state tribunal ignored the teaching of this Court that before conduct can be characterized as subject to any *per se* rule "inquiry must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

8. Supplier refusals to sell for resale outside a given area in order to avoid the disruptive effect on their marketing operations in other areas in which they maintain exclusive or selective distributorships have been sustained. See, *e.g.*, *Naify* v. *McClatchy Newspapers*, 599 F.2d 335 (9th Cir. 1979). *Cf. Dakota Wholesale Liquor, Inc.* v. *State of Minnesota*, 457 F.Supp. 480 (D. Minn. 1978), *aff'd per curiam*, 584 F.2d 847 (8th Cir. 1978) (denial of preliminary injunction).

such restrictions, and the California designation statute merely enables suppliers to establish in that state a distributional structure neither less nor more restrictive than permitted by the Sherman Act.[9]

Just this Term, in *Colby Distributing Co., Inc.* v. *Lennen*, 227 Kan. 2d 179, 606 P.2d 102 (1980), *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc.* v. *Lennen*, 49 U.S. Law Week 3331 (Nov. 3, 1980) (No. 80-189), this Court has reviewed a decision of the Kansas Supreme Court which upheld, on the basis of the Twenty-first Amendment and also as not repugnant to the federal antitrust laws and Constitution, a far more restrictive primary source requirement than that of the California statute at issue here. While §23672 permits intrabrand competition in that a supplier is free to designate more than one wholesaler in any marketing area and the statute neither imposes nor requires any limitations upon the territory served by any wholesaler, the Kansas statute, in addition to providing that no wholesaler is to sell a brand other than pursuant to a written agreement with the supplier, also prohibits all intrabrand competition between wholesalers. The Kansas statute mandates that the territory within which the designated wholesaler is authorized to sell is to be specified and that no supplier can "grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory." (Kan. Stats. Ann., §§41-101, *et seq.*)

9. The California court's statements, repeated throughout its opinion, that §23672 gives to suppliers or brand owners an unfettered or unqualified power to restrain trade and that their decisions are "final" disregard the availability of federal antitrust suits. Neither the California statute nor the primary source requirements of most of the other states even purport to immunize selective wholesaler designation or franchises, let alone any vertical restrictions upon resale, from the antitrust laws. If any such arrangements result in an unreasonable restraint of trade, then antitrust actions in federal court, with a full rule-of-reason evaluation, are available to private parties and government enforcement officials, just as is the case with respect to the provision of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13) that nothing therein shall prevent sellers "from selecting their own customers in bona fide transactions not in restraint of trade. . . ."

On appeal to this Court, the parties challenging the Kansas statute urged, as they had before the state courts, that its delegation of authority to private parties to establish exclusive, territorially confined distributorships was in *per se* violation of the Sherman Act. Rejection of those *per se* contentions by the Kansas Supreme Court establishes a direct conflict between its decision in the *Colby* case and that of the California court in *Williams*. If this Court's summary dismissal of the appeal from *Colby* for lack of a substantial federal question was not solely upon Twenty-first Amendment grounds, then *Colby* further evidences the conflict between *Williams* and the decisions of this Court.

WSWA and NBWA submit that §23672 does not contravene, purport to authorize or mandate any violation of the Sherman Act. Without exception, the decisions of this Court establish that in order to find a state statute repugnant to the antitrust laws it must compel action by private parties which is a *per se* or other clear violation. In another case involving a challenge to state liquor regulations based upon alleged Sherman Act grounds, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45 (1966), this Court declared:

> "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446. We find no such clear conflict in the present case. . . . [The state regulation] imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of [the state regulation]."

By contrast, in the recent case of *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court upheld a line of California state court

decisions[10] striking down California's price posting requirements for wine and spirits. Those decisions, however, involved California's total delegation to private parties of the unsupervised power to set minimum resale prices to be charged by the purchasers of their brands. Such vertical price-fixing, lacking even the pretense of state review or involvement, constituted a *per se* violation of the Sherman Act on the face of the statutes and without more.

B. The *Williams* Case Conflicts With Controlling Decisions Of This Court And Of The Kansas Supreme Court As To The Authority Of The States Under The Twenty-first Amendment To Enact Designated Wholesaler/Primary Source Laws.

Even if the California and other primary source statutes violated the Sherman Act, any claim of federal pre-emption would necessarily fall because of the power granted to the states by §2 of the Twenty-first Amendment, which provides that "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The California court rejected the applicability of the Amendment without analysis other than its *ipse dixit* that "the designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution." (A12) Concluding instead that the state's interests, allegedly in conflict with the competitive objectives of the Sherman Act, must be reconciled with those federal interests, the court applied its own mistaken balancing test and found the state interests lacking. This determination is wholly at odds and in conflict with the long line of Twenty-first Amendment decisions of this Court, including *Midcal* (and possibly the summary dismissal of the appeal from *Colby*).

10. See *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978); *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Board*, 87 Cal. App.3d 996, 151 Cal. Reptr. 492 (1979); *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App.3d 979, 153 Cal. Rptr. 757 (1979).

From its adoption, the Twenty-first Amendment has been accorded a broad sweep by this Court. Particularly germane are several decisions. Directly contrary to the conclusions of the court below, for example, is the characterization by Justice Brandeis in *State Board* v. *Young's Market Co.*, 299 U.S. 59, 63 (1936), "Can it be doubted that a State might . . . channelize desired importations by confining them to a single consignee?" As Justice Black stated in his dissenting opinion in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 339 (1964):

> ". . . [T]his Court in *State Board* v. *Young's Market Co.* . . . said that a State is perfectly free to set up a state liquor monopoly or to confer a liquor monopoly upon some one dealer in the State. It is equally obvious that New York is free to allow only a limited number of dealers to engage in the liquor business. It might do this because it wanted to discourage consumption, or to make it easier to police the liquor traffic, or to accomplish some other objective the State thought worthwhile to protect against the evils which can flow from the traffic. In particular, New York might want to see that sales are not diverted to Idlewild from other dealers licensed and regulated by the State."

Based upon the Twenty-first Amendment, in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972), the Court sustained a South Carolina requirement that producers could ship alcoholic beverages into that state only to an employee located there. The Court held that the requirement that sales be localized in South Carolina was an appropriate exercise of the state's power under the Twenty-first Amendment and was not merely a subterfuge to subject out-of-state sellers to taxation contrary to the provisions of 15 U.S.C. §381. Reiterating that "by virtue of [the provisions of the Twenty-first Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders" (409 U.S. at 283), the Court concluded

that the South Carolina requirement did not violate the Commerce Clause. Just as the designated wholesaler or primary source requirements in California and elsewhere are part of overall, complex and integrated regulatory schemes of similar character, the South Carolina local sale requirement was evaluated by the Court as an integral part of the total regulatory structure of that state:

> "South Carolina's Alcoholic Beverage Control Act is a long and detailed statute. Requirements that certain records be kept by the manufacturer, the wholesaler and the retailer pervade the scheme. There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records. . . .
>
> "The requirement that before engaging in the liquor business in South Carolina a manufacturer do more than merely solicit sales there is an appropriate element in the State's system of regulating the sale of liquor. . . ." (409 U.S. at 282-283)

By analogy, California should be free to require purchases only from the primary source suppliers accountable to the state and to exclude sales by Oklahoma wholesalers not subject to the same responsibilities and controls.

More recently, in *Midcal,* this Court reiterated that "the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (445 U.S. at 110) Thus, while the federal government retains some Commerce Clause authority over intoxicating beverages, as this Court's decisions demonstrate, restrictions upon importation and the structuring of their distribution systems are a matter of "virtually complete control" by the states. The extent to which this special authority granted to the states by the Twenty-first amendment must be weighed in favor of their regulations in balancing the extent of any conflicting federal interests is

delineated by *Midcal,* was disregarded by the court below, and places the *Williams* decision in sharp conflict with *Midcal* and the earlier decisions of the Court.

The clear federal interest at issue in *Midcal* was price competition and the *per se* outlawing of private vertical price-fixing—an interest of paramount importance to the competitive objectives of the Sherman Act and involving conduct determined to be without justification or defense because of its "pernicious effect on competition and lack of any redeeming virtue." This prime federal competitive goal was opposed only by California's claimed interest in temperance and the preservation of small retailers against their larger competitors. In *Midcal,* however, California had "shown less than an enthusiastic interest in its wine pricing system" (445 U.S. at 111 n.12), and there were evidence and findings both by California's administrative agency responsible for alcoholic beverage control and by its courts that in fact the asserted state interests were not advanced by resale price-fixing. Emphasizing the importance of preserving the regulatory power granted to the states, this Court noted that "the findings and conclusions of [the California] courts are not binding on this Court to the extent they undercut state rights guaranteed by the Twenty-first Amendment." Nevertheless, on the record there was no basis for disagreeing with the California courts' conclusions, which were reasonable and supported by the only evidence of record:

> ". . . Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians."

With no basis for supporting the claimed state interests, therefore, this Court ruled that the "unsubstantiated state concerns put forth in this case simply are not of the same stature as the goals of the Sherman Act" and "the Twenty-first Amendment provides no shelter for the violation of

the Sherman Act by the State's wine pricing program." (445 U.S. 111-114)

In conflict with the rationale set forth in *Midcal,* the court below expressly rejected the contention that the California designated wholesaler/primary source statute "is within the state's virtual complete control over whether to permit importation or sale of liquor and how to structure the distribution system." Purporting to balance the allegedly competing state and federal interests, the California court, with no analysis other than its equating the wholesaler designation statute with "the price maintenance laws" previously overturned, initially placed upon the federal tray of the scale a conclusion defying any possible counter-weight: "The grant of power to a private party to prohibit interstate commerce between other private parties and to limit competition in the California wholesale market results in a complete undermining of the federal policies embodied in the Sherman Act." Understandably, thereafter, the court totally dismissed any state interests "purportedly served by the designation statute," including facilitating the monitoring and tracing of distilled spirits, aid in the collection of excise taxes, maintenance of the three-tier system of distribution, and preserving the competitative viability of small retailers. (A12-A14)

Even if it were assumed that §23672 somehow violates the Sherman Act, it is clear, for the reasons discussed in the preceding section of this brief and analyzed by this Court in *Sylvania,* that even the most restrictive vertical arrangements any supplier could adopt under the aegis of that statute might stimulate trade and commerce by promoting vigorous interbrand competition. There can be no reasoned basis, therefore, for the lower court's conclusion, without benefit of any evidentiary showing, that the designation statute completely undermines the federal policies of the Sherman Act or that it fails to vindicate the legitimate state interests dismissed by the court.

In its dismissal of the appeal from the Kansas Supreme Court's decision in the *Colby* case for want of a substantial

federal question, this Court presumably concluded either that the far more restrictive primary source statute there did not violate the Sherman Act or that the Twenty-first Amendment reserves to the states the power to enact such regulations. While the absence of any basis for the Sherman Act claims there or here seems so apparent, if this Court dismissed the appeal in *Colby* on Twenty-first Amendment grounds, then *Williams* conflicts not only with the decision of the Kansas Supreme Court but presumably with the view of the Amendment applied by this Court in reviewing that case.

C. The *Williams* Decision Raises Significant And Recurring Problems Of Great Moment To The Regulation Of Alcoholic Beverages And The Competitive Vigor Of Their Distribution In Many Other States, Threatens Continuing Litigation And Demonstrates The Need For Clarification Of This Court's Prior Twenty-first Amendment Decisions.

The importance of the *Williams* case far transcends just its deleterious impact upon distilled spirits regulation and the competitive character of the trade in California. This much-publicized and erroneous decision has had and will continue to have substantial, far-reaching precedential impact in view of the similar designated wholesaler/primary source laws which exist in a majority of the license states. Its importance is underlined by the fact that, based upon the incorrect application by the California court of principles of federal antitrust law, pre-emption and supremacy, the primary source requirements of other states have already been challenged in pending litigation and the filing of additional suits asserting the same claims and raising the same issues is almost certain.[11] In situations

11. *H&H Distributing Company, Inc.* v. *Mississippi State Tax Commission, et al.*, Civil No. J80-0323(N), S.D. Miss. (Jackson Div.); *Mile Hi Wholesale Liquors, Inc.* v. *Alan Charnes, Executive Director of the Department of Revenue, State of Colorado*, Case No. 80 C.V. 8844, Dist. Ct., City & County of Denver, State of Colorado.

such as this, where a holding brings into question the constitutionality or validity of statutes in force in many states, the Court has granted certiorari to review a state court decision invalidating a state statute on federal repugnancy grounds. *New York* v. *O'Neill*, 359 U.S. 1, 3 (1959).

Other than the primary source requirements, various provisions of essentially every state regulatory structure impose restrictions upon the trade in alcoholic beverages, prohibiting acts and practices pursuant to vertical arrangements which promote competition in other industries. To illustrate, many state regulations prohibit or control the extension of credit or granting of discounts by wholesalers to retailers. The erroneous rationale of *Williams* would not only appear to support invalidation of these state restrictions upon competition but also raises troublesome questions whether wholesalers complying with these regulations, should they be overturned, could be found to have been parties to a combination in *per se* violation of the Sherman Act[12] while such provisions were in effect. In fact, a suit has just been filed in federal court in San Francisco against California wholesalers alleging a Sherman Act price-fixing conspiracy in consequence of their having complied with a state regulation restricting discounts, requiring posting of prices with the state control agency and allowing, prior to the effective date, only downward revision of prices to meet lower prices posted by competitors for the same period.[13] Apparently on the authority of the *Williams* decision, it is alleged that these regulatory requirements are unconstitutional because they restrain competition and provide a means for price-fixing.

WSWA and NBWA submit that it is imperative that this Court review the decision below because of its broad importance to competition in and state regulation of the alcoholic beverage industries. Particularly is that true

12. Cf. *Catalano, Inc.* v. *Target Sales, Inc.*, 100 S. Ct. 1925 (1980); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

13. *Enrico's Inc.* v. *Baxter Rice, et al.*, Civil No. 81-0068 SC, N.D. Cal.

inasmuch as the *Williams* decision purports to be premised upon this Court's decision in *Midcal*. Reiteration and clarification of the *Midcal* rationale will avoid the controversy and confusion which *Williams* is generating. See *SEC* v. *United Benefit Life Insur. Co.*, 387 U.S. 202, 207 (1967); *Afroyim* v. *Rusk*, 387 U.S. 253, 255-256 (1967). The extensive recurrence of the issues raised here and the conflicting treatment they have received by two state courts fully merit this Court's definitive restatement of the governing principles in matters of great importance to all of the alcoholic beverage industries and the state legislatures and agencies which regulate them. *International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 287 (1957); *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 671 (1961).

Conclusion

For the reasons stated, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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